85-1641

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

LINDA MULLIGAN,

Petitioner,

v.

FRANCIS HAZARD, KENT SCHWIRIAN, S. EARL BROWN, JOHN T. MOUNT, W. ANN REYNOLDS, KATHRYN T. SCHOEN, DOROTHY W. JACKSON, DIETHER H. HAENICKE, JOHN D. JACOB, AND THE OHIO STATE UNIVERSITY BOARD OF TRUSTEES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FREDERICK G. CLOPPERT, JR.
(Counsel of Record)
SUSAN TRUITT
CLOPPERT, PORTMAN, SAUTER, LATANICK & FOLEY
225 East Broad Street
Columbus, Ohio 43215
(614) 461-4455

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QUESTIONS PRESENTED

Without applying the analysis of *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), the court below held that the *Wilson v. Garcia,* — U.S. —, 105 S. Ct. 1938 (1985) decision should be applied retroactively in all pending 42 U.S.C. Section 1983 and 1985 cases. The court chose to apply Ohio's one year statute of limitations regarding certain intentional torts, rather than Ohio's two year statute of limitations regarding personal injury, or Ohio's four year statute of limitations for injuries to rights not arising on contract, to bar petitioner's claims. On that basis, without a trial, the court rejected as time barred a tenured faculty member's claim that the respondents are presently restricting her tenure rights without a prior or a post hearing. The court also ruled that derogatory letters in petitioner's personnel file were time barred and did not violate petitioner's liberty interests, despite the fact that the petitioner could not and should not have discovered the existence of such letters until less than one year before the action was filed. The court further held that a derogatory letter written within one year of the time of filing also did not violate petitioner's liberty interests, because with material already in petitioner's file the most recent letter was merely cumulative. The questions presented by this decision are:

1. Is the court of appeals' precedent-setting decision to use *DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151 (1983) to require retroactive application of the new one year statute of limitations in all pending Sections 1983 and 1985 cases, thereby automatically time barring all pending cases filed under and dependent upon pre-*Wilson* statutes of limitations, contrary to

this Court's decision in *Wilson* and in *Chevron, supra* and in conflict with the rulings of other federal courts of appeal applying *Wilson*?

2. Is the court of appeals' holding that the new statute of limitations in 42 U.S.C. Sections 1983 and 1985 cases should be taken from Ohio Revised Code ("Oh. Rev. Code") Section 2305.11, a one year period relating to certain intentional torts, rather than from Oh. Rev. Code Section 2305.10, a two year period relating to personal injury, or Oh. Rev. Code Section 2305.09, a four year period relating to certain torts, including injury to the rights of plaintiff not arising on contract, contrary to this Court's decision in *Wilson*?

3. Is the court of appeals' holding that a new statute of limitations retroactively time bars action by tenured faculty member against state university administrators for ongoing constitutional tort in conflict with the rulings of other courts of appeal with respect to ongoing constitutional tort?

4. Is the court of appeals' holding that an untenured faculty member accruing tenure in a public university cannot have a property interest in contractual agreements as to the type, location, or conditions of that accruing tenure in conflict with this Court's decision in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972) and the Fifth and Fourteenth Amendments to the United States Constitution?

5. In changing employee tenure system, is failure to give prior notice or hearing or subsequent notice that changes have been made contrary to the due process clause of the Fourteenth Amendment to the United States Constitution and contrary to this Court's decisions

in *Cleveland Board of Education v. Loudermill*, — U.S. —, 105 S. Ct. 1487 (1985) and *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1977), and can court below assert erroneous fact of notice contrary to the record?

6. Is a tenure system at a state university which restricts the rights, privileges, or activities of a faculty member to a specific site within the university in violation of the First Amendment Freedom of Speech and Fourteenth Amendment Equal Protection clauses, and in conflict with *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) and *Sweezy v. New Hampshire*, 354 U.S. 234 (1957)?

7. Is the court of appeals' holding that the statute of limitations for rectifying a liberty interest violation begins to run from the time damaging material is placed in an employee's personnel file, rather than from the time that damaging material is or could have been discovered, contrary to this Court's holding in *Holmberg v. Armbrecht*, 327 U.S. 392, 396-97 (1946)?

8. Is the court of appeals' holding that an employee's personnel file can be so falsely derogatory that adding additional false and derogatory material does not constitute a violation of liberty interests in conflict with the protections of the Fourteenth Amendment, in conflict with this Court's decisions in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Bishop v. Wood*, 426 U.S. 341 (1976), and in conflict with the rulings of other federal courts of appeal with respect to continuing constitutional tort?

Rule 28.1 listing of corporate affiliates not applicable.

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FRANCIS HAZARD, KENT SCHWIRIAN, S. EARL BROWN, JOHN T. MOUNT, W. ANN REYNOLDS, KATHRYN T. SCHOEN, DOROTHY W. JACKSON, DIETHER H. HAENICKE, JOHN D. JACOB, AND THE OHIO STATE UNIVERSITY BOARD OF TRUSTEES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Linda Mulligan hereby petitions this Court to issue a writ of certiorari to the United States Court of Appeals for Sixth Circuit to review the judgment in *Mulligan v. Hazard, et al.*, 777 F.2d 340 (6th Cir. 1985); petition for rehearing and rehearing *en banc* denied January 7, 1986.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Ohio is unreported and is reprinted at pages A-11-19 in a separately bound Appendix to this Petition (hereinafter "App."). The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 777 F.2d 340, and is reprinted at App. A-1-10.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 26, 1985. A timely petition for rehearing and rehearing *en banc* was denied on January 7, 1986. App. A-21. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

42 U.S.C. 1983, (App. A-23).

42 U.S.C. 1985, (App. A-24-25).

United States Constitution, First Amendment (App. A-22).

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United States Constitution, Fourteenth Amendment (App. A-22).

Ohio Revised Code ("Oh. Rev. Code").

Oh. Rev. Code Section 2305.06 (App. A-26).

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Oh. Rev. Code Section 2305.09 (App. A-28).

Oh. Rev. Code Section 2305.10 (App. A-29).

Oh. Rev. Code Section 2305.11 (App. A-30-33).

Oh. Rev. Code Section 2305.14 (App. A-34).

Rules of the University Faculty (Ohio Administrative Code) Section 3335-3-35(B)10 (App A-35).

Rules of the University Faculty (Ohio Administrative Code) Section 3335-5-01 (App. A-36).

Rules of the University Faculty (Ohio Administrative Code) Section 3335-5-03 (App. A-37).

STATEMENT OF THE CASE

Statement of the Facts

Petitioner, Dr. Linda Mulligan, ("Mulligan") is a tenured Associate Professor in the Department of Sociology at the Ohio State University ("OSU"). Respondents are various OSU officials who have interpreted and applied tenure at OSU so as to restrict Mulligan's academic freedom rights and who have abridged her full tenure privileges.

OSU encompasses a number of campuses in five separate cities, yet is structured as a single integral university.

OSU includes a large central campus in Columbus, Ohio, and four small regional campuses in other cities. These campuses are academically and administratively integral; each of the academic disciplines in the University is represented by a single, multi-campus, academic department.

Mulligan was hired in 1973 by and in the academic Department of Sociology at the University. She was hired to perform three complementary responsibilities—teaching, research and service. Because the academic departments of OSU had teaching responsibilities on some or all of the five campuses, faculty were hired with the understanding that their classroom teaching responsibilities were to be at one of the five campuses of OSU. Mulligan received tenure in 1979 while teaching classes at the Marion Campus of OSU.

The research and service responsibilities of OSU faculty members were not campus-specific, nor could they be. Because OSU's four branch campuses were organized as integral parts of OSU, there were not any research facilities at the branch campuses.

The branch campuses were never separate academic units within the University. In 1980, after Mulligan received tenure in 1979, all four branch campuses were made academic units within the University, and renamed as regional campuses. At that same time Mulligan, already a member of the OSU Faculty and the OSU Department of Sociology Faculty, was in addition designated as a member of the Marion Regional Campus Faculty. A similar action was taken at that time with respect to all faculty teaching at the four OSU branch campuses.

Despite the fact that until 1980 there was no separate educational unit or academic faculty at the branch cam-

puses in which faculty could be tenured, in 1975 a plan for "campus-specific" tenure ("plan") was implemented by the respondents. This plan was never published in the OSU *By-Laws of The Board of Trustees* ("*By-Laws*") or in the *Rules of University Faculty* ("*Rules*")[1] No OSU faculty were afforded the opportunity to review or act on the proposed plan, nor were the faculty ever informed of the proposed change in tenure status. Mulligan was not aware of the proposed change until, at the earliest, 1980. Even then, the plan had not been published in either the *Rules* or the *By-Laws*. Mulligan first became aware of the plan due to the respondents' attempts to restrict her opportunities to fulfill her research and service obligations to the physical site of the Marion Campus.

Proceedings Below

Petitioner Mulligan filed this action on October 20, 1983. Before discovery was completed in the case the district court granted respondents' motion for summary judgment on May 15, 1984. The district court held that petitioner had not established a property right in unrestricted tenure, and that her liberty interests had not been violated. (App. A-11-17.) Mulligan's subsequent timely motion to vacate judgment was denied on June 14, 1984. (App. A-18-19.)

The questions before the appellate court were whether petitioner had a property right in unrestricted tenure; whether petitioner's right to academic freedom protected

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[1] When hired, Mulligan was told that the *Rules* and the *By-Laws* comprised the terms of her employment. There is an inherent requirement that any such rules must be published in a manner reasonably designed to come to the attention of, and be available to, all faculty.

by the First and Fourteenth Amendments had been violated; whether respondents conspired to infringe petitioner's tenure rights; and whether petitioner's liberty interests were violated by false materials in her personnel file.

The appellate court held that *Wilson v. Garcia,* — U.S. —, 105 S. Ct. 1938 (1985) applied retroactively, and chose to apply a one year statute of limitations pertaining to malpractice, battery, and other intentional torts, bypassing a two year personal injury statute of limitations and a four year injury to rights not arising on contract statute of limitations, to bar petitioner's claims. (App. A-1-10.)

The court below also held that there was no violation of petitioner's liberty interests since the materials placed in her files within one year of filing suit were "merely cumulative" of prior derogatory material.

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REASONS FOR GRANTING THE WRIT

The decision below conflicts with this Court's analysis in *Wilson v. Garcia,* — U.S. —, 105 S. Ct. 1938 (1985), as well as the decisions of numerous courts of appeals, both by its choice of a one year limitations period pertaining to malpractice, battery, and other intentional torts when there was available a two year limitations period pertaining to personal injury, as well as a four year limitations period governing injury to rights not arising on contract, and by its failure to apply the analysis in *Chevron Oil v. Huson,* 404 U.S. 97 (1971) in applying *Wilson* retroactively.

Additionally, the appellate court's holding that false and derogatory material in a personnel file was not actionable and that additional false and derogatory material added to the file was merely cumulative is contrary to this Court's interpretation of liberty interests found in *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Bishop v. Wood*, 426 U.S. 341 (1976).

I. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S RECENT DECISION IN WILSON AND THIS COURT'S ANALYSIS IN CHEVRON, AND IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS

A. It was established in *Wilson* that each state's statute of limitations pertaining to personal injury would henceforth govern Section 1983 actions. *Wilson* did not determine what to do when, in a given state, more than one statute of limitations applied to personal injury actions. The court below applied a one year intentional tort applicable to libel, slander, assault, battery, malicious prosecution, false imprisonment, or malpractice statute of limitations (Oh. Rev. Code Section 2305.11, App. A-30-33) when it had available to it a two year limitations period governing personal injury (Oh. Rev. Code Section 2305.10, App. A-29) and a four year limitations period governing injury to rights not arising on contract. (Oh. Rev. Code Section 2305.09, App. A-28).[2] The Sixth Circuit's choice

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[2] Ohio's statutes of limitations which also were arguably applicable include: Oh. Rev. Code Section 2305.06 (App. A-26): contract in writing, fifteen (15) years; Oh. Rev. Code Section 2305.07 (App. A-27): contract not in writing, six (6) years; Oh. Rev. Code Section 2305.14 (App. A-34): for other relief, ten (10) years.

of the statute of limitations to be applied is in direct conflict with decisions of other circuits.

1. In *Hamilton v. City of Overland Park*, 730 F.2d 613 (CA10 1984) (*en banc*), *cert. denied*, — U.S. —, 53 L.W. 3753 (1985) the court rejected, for Section 1983 purposes, Kansas' one year limitations statute for assault, battery, malicious prosecution or false imprisonment, and chose instead Kansas' two year limitations for injury to rights not arising on contract. The Tenth Circuit finds common law trespass statutes of limitations inappropriate for Section 1983 cases, applying instead the limitations period relating to personal injury.[3]

2. The court in *Jones v. Preuit and Mauldin*, 763 F.2d 1250 (CA11 1985), *cert. denied*, — U.S. —, 54 L.W. 3497 (1986), applied a six year limitations period governing trespass, rather than a one year period for trespass on the case.

B. This Court established in *Chevron Oil Co., v. Huson*, 404 U.S. 97 (1971) a three-fold analysis to be examined when determining whether a new statute of limi-

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[3] See also, *Mismash v. Murray City*, 730 F.2d 1366 (CA10 1984) (*en banc*), *cert. denied*, — U.S. —, 53 L.W. 3753 (1985) (Utah's one year statute of limitations governing libel, slander, assault, battery, false imprisonment or seduction was rejected and, in the absence of an express limitations statute governing actions for injury to the rights of another, a four year limitations period for an action for relief not otherwise provided by law was applied); *McKay v. Hammock*, 730 F.2d 1367 (CA10 1984) (*en banc*) (applying Colorado's three year statute governing all actions for which no other limitation period is provided by law, rather than a one year period for trespass or a six year period for trespass on the case). All three of these Tenth Circuit cases were companion cases to the decision affirmed in *Wilson, supra*.

tations should be applied retroactively.[4] The first consideration under the *Chevron* analysis is whether the decision represents a "clear break" from past law, as *Wilson* certainly did.[5] The law at the time petitioner filed her suit was clearly that the most closely analogous state statute of limitations for the factual predicate of plaintiff's complaint should be used in Section 1983 actions. *Board of Regents v. Tomanio*, 446 U.S. 483 (1980); *Mason v. Owens-Illinois, Inc.*, 517 F.2d 520, 521 (CA6 1975). There were various statutes in Ohio which were arguably applicable, ranging from four years to fifteen years.[6] All of the prior Sixth Circuit decisions applying Ohio statutes

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4 The court below relied upon *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), instead of *Chevron* in its analysis. The retroactive application of a limitations period in *DelCostello* was based, in part, on the national labor policy promoting rapid resolution of labor disputes. There is no remotely comparable policy in Section 1983 cases which advocates speedy resolutions. Moreover, the decision in *DelCostello* was essentially foreshadowed by this Court's decision in *United Parcel Services, Inc. v. Mitchell*, 451 U.S. 56 (1981). Prior to *Wilson* there was no indication of Supreme Court disapproval of the method of borrowing the most analogous state statute of limitations in Section 1983 actions. The court below relied on the fact that this Court in *Wilson* applied the statute of limitations retroactively to the case before it. However, the claim in *Wilson* was not barred by the retroactive application of the personal injury statute of limitations; rather, in *Wilson* retroactive application of the new statute of limitations prevented the case from being time barred.

5 Justice O'Connor notes that *Wilson*, in abandoning the rule that a federal court adjudicating rights under Section 1983 will borrow the most closely analogous state statute of limitations, rejects a century old rule of law. *Wilson*, 105 S. Ct. at —, dissenting opinion.

6 See note 2, *supra*, and accompanying text.

of limitations to Section 1983 actions applied either a four year or a six year statute of limitations, except for Section 1983 actions for malicious prosecution or false imprisonment.[7]

The court chose, instead, to retroactively apply a narrow one year limitations period,[8] a clear break from the past. Moreover, the court below extended the new statute of limitations for Section 1983 cases to Section 1985 cases as well, an additional break with the past.[9]

The second *Chevron* factor is whether the retroactive application would further or hinder the operation of the newly-formed rule. One purpose of the rule in *Wilson, supra,* was the interest in uniformity, certainty and unnecessary litigation. *Wilson, supra,* 105 S. Ct. at 1947. Another policy consideration apparent when this Court chose the personal injury limitations period over other possible choices was to minimize the risk that states would provide limitations periods that were too short. *Wilson,*

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7 See note 11, *infra,* and accompanying text.

8 Instead of applying Oh. Rev. Code Section 2305.09 (App. A-28), a four year period for injury to the rights of plaintiff not arising on contract, or Oh. Rev. Code Section 2305.10 (App. A-29), a two year period for bodily injury or injury to personal property, the court below chose Oh. Rev. Code Section 2305.11 (App. A-30-33), a one year statute aimed narrowly at libel, slander, assault, battery, malicious prosecution, false imprisonment or malpractice actions.

9 Previously, the Sixth Circuit had definitively held the statute of limitations in Section 1985 cases to be different from the statutes of limitations in Section 1983 cases. See *An-Ti Chai v. Michigan Technological University,* 493 F. Supp. 1137 (W.D. Mich. 1980) app. dismissed, 727 F.2d 1108 (CA6 1984).

supra, 105 S. Ct. at 1949. One of the compelling policy considerations announced in *Wilson* was the importance of a Section 1983 remedy itself. The nature of a Section 1983 action deserves protection from undue haste in barring such claims. Retroactive application of *Wilson* to shorten a limitations period and bar a plaintiff his or her day in court would certainly hinder or retard one of the primary considerations of the *Wilson* decision, *i.e.*, the value of the Section 1983 remedy itself. As such, examination of the second prong of the *Chevron* test precludes retroactive application of *Wilson* to effect a shorter statute of limitations which would bar a plaintiff's case from court.

The third factor *Chevron* establishes is whether a retroactive application would provide substantially inequitable results. In the instant case, the results of retroactive application of the new rule of law, representing a clear break from the past, are substantially inequitable. Petitioner's claim has been barred by the retroactive application of a one year statute of limitations in the court below.[10] At the time petitioner filed the complaint in this case she justifiably relied on the clear rule of law that the state statute of limitations dealing with the most closely analogous claim applied at that time, which in her case

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[10] This Court quoted with approval the Tenth Circuit Court of Appeals that although it was establishing a new statute of limitations in Section 1983 actions it would not apply it retroactively to bar a litigant's right to their day in court when the action was timely under the law in effect at the time the suit was filed. *Wilson*, 105 S. Ct. at 1941 n 10; see also, *Gibson v. U.S.*, 781 F.2d 1334 (CA9 1986) (Actions which commence outside of the limitations period, but which continue into the limitations period, bring the claim within the limitations period).

would have been fifteen years for the portions of the claim depending on written contract, and four to ten years for the other parts of the claim. Petitioner Mulligan foreseeably relied on the consistent precedent in the Sixth Circuit that the shortest limitations period to be applied in her Section 1983 action would be four years.[11]

The decision in the court below is also in conflict with decisions among the circuits. Of the other courts of appeals all but the Third, Fifth, and Eighth Circuits have declined to apply *Wilson* retroactively to bar a plaintiff, who would not otherwise have been barred, their day in court.[12] Moreover, the Third and Eighth Circuits care-

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11 See, e.g., *Schorle v. City of Marine Hills,* 524 F. Supp. 821 (S. D. Oh. 1981) (applying four year period of Oh. Rev. Code Section 2305.09 to a Section 1983 claim of violation of right to counsel); *Crawford v. Zeitler,* 326 F.2d 119 (CA6 1964) (stating that while one year period applied to malicious prosecution and false arrest, four year period of Oh. Rev. Code Section 2305.09 would apply to all other Section 1983 actions); *Mason v. Owens-Illinois, Inc.,* 517 F.2d 520 (CA6 1975); (applying Oh. Rev. Code Section 2305.07, a six year period, to Section 1983 actions); *Austin v. Brammer,* 555 F.2d 142 (CA6 1977) (applying one year period of Oh. Rev. Code Section 2305.11 to Section 1983 action for false arrest and malicious prosecution); *Kilgore v. City of Mansfield,* 679 F.2d 632 (CA6 1982) (applying one year period of Oh. Rev. Code Section 2305.11 to Section 1983 action for false arrest and malicious prosecution).

12 See, for example, *Jackson v. City of Bloomfield,* 731 F.2d 652 (CA10 1984) (expressly declining to apply *Wilson* retroactively where prior pecedent established a longer limitations period upon which plaintiffs may have relied); *Hamilton v. City of Overland Park, supra,* (retroactively applied *Wilson,* court of appeals decision to extend the limitations period and grant plaintiff his day in court); *Mismash v. Murray City,*

(Continued on following page)

fully employed the *Chevron* test before applying the new statute of limitations retroactively, and no appeals court other than the Sixth Circuit has relied upon *DelCostello* as the controlling opinion.[13]

(Continued from previous page)

supra, (retroactively extended limitations period to permit plaintiff his day in court); *McKay v. Hammock, supra,* (followed *Wilson,* court of appeals decision, in applying residual statute of limitations, extending the period and providing plaintiff his day in court); *Gibson v. United States,* 781 F.2d 1334 (CA9 1986), ("[w]hen retroactive application would shorten the statute of limitations, *Wilson* merits only prospective effect." *Gibson* at 1339); *Rivera v. Green,* 775 F.2d 1381 (CA9 1985), pet. for cert. pending, (expressly stating that *Wilson* should be applied retroactively to lengthen the statute of limitations time period but should not be applied retroactively to shorten the period); *Jones v. Preuit & Mauldin,* 763 F.2d 1250 (CA11 1985) (retroactively applied *Wilson* to extend limitations period and grant plaintiff his day in court); *Winston v. Saunders,* 610 F. Supp. 176 (1985) (*Wilson* should not be applied retroactively to deny plaintiff access to court); *DeNardo v. Murphy,* 761 F.2d 1345 (CA9 1986) (two year statute of limitations period applied whether or not *Wilson* was applied retroactively; there were no prior published opinions setting a limitations period upon which plaintiffs could have relied).

[13] *Smith v. City of Pittsburgh,* 764 F.2d 188 (CA3 1985) *cert. denied,* — U.S. —, 106 S. Ct. 349 (1985). (The Third Circuit pointed out that there were no prior Section 1983 decisions in the circuit applying a statute of limitations longer than two years; therefore, because the plaintiff could not have relied upon a longer period, the two year time limit retroactively applied.) See also, *Fitzgerald v. Larson,* 769 F.2d 160 (CA3 1985); *Wycoff v. Menke,* 773 F.2d 983 (CA8 1985) (the Eighth Circuit pointed out that previous decisions in that circuit should have placed Wycoff on notice that a two-year limitations period, the same as that finally adopted and applied retroactively in his case, might be applicable); *Gates v. Spinks,* 771 F.2d 916 (CA5 1985), cert. denied, — U.S. —, 54 L.W. 3598 (1986) (the court declined a residual, catch-all limitations period which encompassed actions based on theories other than tort and chose to apply the only state limitations period expressly applicable to personal injury actions).

C. The court below failed to take into consideration the fact that petitioner was never permitted to establish that her claims were within the statute of limitations by showing that they are continuing in nature.

1. In *Corbitt v. Anderson*, 778 F.2d 1471 (CA10 1985) a psychologist brought a Section 1983 action claiming the defendant was on a campaign to destroy plaintiff's professional standing. While some of the alleged action occurred outside the limitations period, the Tenth Circuit held that where the defendant's actions continued within the limitations period, the plaintiff's claims were not barred.

2. In *Page v. United States*, 729 F.2d 818 (D.C. Cir. 1984), it was held that "[w]hen a tort involves continuing injury, the cause of action accrues, and the limitation period begins to run, at the time the tortious conduct ceases."[14]

Petitioner Mulligan continues to suffer deprivation of her tenure rights as well as her liberty interests, thus bringing this action within the statute of limitations, whatever its length. A statute of limitations does not accrue on a continuing wrong until that wrong has ended. *Taylor v. Meirick*, 712 F.2d 112 (CA7 1983).[15]

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[14] *Id.* at 821, quoting *Donaldson v. O'Connor*, 493 F.2d 507 (CA5 1974), vacated on other grounds, 422 U.S. 563 (1975).

[15] See also, *Railing v. UMW*, 429 F.2d 780, 783 (CA4 1970) (federal cause of action for alleged destruction of business accrues on last date of continuing illegal conduct for purposes of applicable state statute of limitations); *Baxter v. Curtis*, 201 F. Supp. 100 (N.D. Oh. 1962).

II. THE DECISION BELOW RAISES COMPELLING QUESTIONS CONCERNING TENURE AND ACADEMIC FREEDOM RIGHTS OF STATE UNIVERSITY FACULTY

Petitioner, a tenured faculty member at OSU, has been subjected to and continues to suffer restriction and denial of her tenure rights. Tenure rights of a teacher may not be arbitrarily abridged, diminished, or deleted. See, *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972). Moreover, liberty interests are often fundamentally entwined with property rights. *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972). The restrictions on petitioner's tenure rights are an infringement on her rights to academic freedom and stigmatize petitioner in her professional pursuits.[16]

Prior to receiving tenure, petitioner was in a tenure track position, accruing rights to tenure. During that period of time respondents attempted to change the type of tenure petitioner was accruing. This Court has previously indicated that where an employee has a tenure track position, it is sufficient to establish a property interest in continued employment. *Vail v. Board of Education*, 706 F.2d 1435 (CA7 1983), *aff'd. by equally divided court*, — U.S. —, 104 S. Ct. 2144 (1984).

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[16] The Sixth Circuit has recognized that constraints in careers or occupations may give rise to infringement of liberty or property interests, *Wilkerson v. Johnson*, 699 F.2d 325 (CA6 1983), as well as finding that inaccurate and stigmatizing personnel files, as petitioner has alleged in this case, infringe on an employee's liberty interests. *Yashon v. Gregory*, 737 F.2d 547 (CA6 1984); *Kendall v. Board of Education*, 627 F.2d 1, 5 (CA6 1980).

Petitioner was never given reasonable and adequate notice of the intended change in her tenure rights, either prior to or after attaining tenure, a situation contrary to this Court's holding in *Cleveland Board of Education v. Loudermill*, 470 U.S. —, 105 S. Ct. 1487 (1985) and *Memphis Light v. Craft*, 436 U.S. 1 (1977).

Moreover, while the proposed change in tenure rights was not published in the *By-Laws*, or the *Rules*, assurances that tenure will not be used to restrict petitioner's rights appear in at least three places in the *Rules* which are themselves encompassed in the Ohio Administrative Code ("Oh. Adm. Code")[17] There exists, at the very least, a factual dispute as to the conflict between the proposed change in tenure and the actual provisions of *Rules* and *By-Laws* of the University.

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[17] Three places in the *Rules* where full tenure rights are guaranteed petitioner are as follows: Oh. Adm. Code Section 3335-3-35 Sec. B(10) (App. A-35) charges department chairmen with seeing that all faculty, regardless of their assigned locations, are offered departmental privileges and responsibilities appropriate to their rank; Oh. Adm. Code Section 3335-5-01 (App. A-36) endorses full academic freedom for all faculty as essential; and Oh. Adm. Code Section 3335-5-03 (App. A-37) states that the protections of tenure and academic freedom extend to all levels of responsibility within the University and are not restricted to activities identified with a particular instructional program. In its written opinion in *Mulligan v. Hazard, supra*, at 344, note 8, the court erroneously states that the change in tenure had been published in the *Rules;* neither respondents nor petitioner have claimed this to be the case. The only place in which any printed reference to campus specific tenure ever appeared has been a surreptitious reference to same in a booklet known as the "Faculty Handbook," a "welcome wagon" publication produced by the OSU office of public relations and containing information about radio and television stations, temperature ranges, etc., in Columbus, Ohio, and referring persons interested in knowing the OSU bylaws and rules to the *By-Laws* and *Rules*.

The importance of academic freedom for university faculty has been emphasized by this Court as recently as *Regents of the University of Michigan v. Ewing*, — U.S. —, 54 L.W. 4055 (1985). In *Ewing*, this Court reaffirmed its commitment in *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) which states "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian*, in turn, quoted from this Court's decision in *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), emphasizing the essential need for teachers to be free to study and to pursue inquiry.[18] In the instant case tenure has been used to physically restrict a faculty member and to place limits on her academic freedom.

III. THE DECISION BELOW CHANGES SUBSTANTIALLY THE CONCEPT OF LIBERTY INTEREST INFRINGEMENTS AND IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS

The court below admitted that some of the derogatory material in petitioner's personnel file was within the one

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[18] The *Sweezy* court stated that "[t]he essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straightjacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

year limitations period, but held that due to the accumulated earlier material, there was no liberty interest infringement. (App. A-1-10.) The court made that determination without ascertaining when petitioner knew or should have known of the existence of the material in her file. Such a holding conflicts with this Court's decision in *Holmberg v. Armbrecht*, 327 U.S. 392 (1946).[19]

Moreover, the lower court's holding that a personnel file can be so falsely derogatory that adding additional false and derogatory matter does not constitute a violation of liberty interests changes substantially this Court's interpretation of liberty interests in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Bishop v. Wood*, 426 U.S. 341 (1976).[20] The likelihood that the petitioner's derogatory personnel file will be provided to any prospective employers seriously implicates petitioner's liberty interests. *Yashon v. Gregory*, 737 F.2d 547 (CA6 1984); *Kendall v. Board of Education*, 627 F.2d 1, 5 (CA6 1980).

The lower court's holding that cumulative material in petitioner's personnel file does not constitute a violation

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19 The equitable doctrine that where a plaintiff remains in ignorance of a wrong without any fault or want of diligence on his part, the statute of limitations does not begin to run until the wrongdoing is discovered, is read into every federal statute of limitations. *Holmberg, supra*.

20 In *Bishop, supra*, substantial emphasis was placed upon the fact that because all communications leading up to the litigation had been oral and in private, they did not impair employee's protected liberty interests. The decision in *Roth, supra*, citing several previous decisions of this Court, makes clear that "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Roth*, at 573.

of petitioner's liberty interests is also contrary to the rulings of other federal courts of appeals concerning continuing constitutional tort violations.[21]

CONCLUSION

For the reasons stated above, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

FREDERICK G. CLOPPERT, JR.
(Counsel of Record)
SUSAN TRUITT
CLOPPERT, PORTMAN, SAUTER,
LATANICK & FOLEY
225 East Broad Street
Columbus, Ohio 43215
Telephone: (614) 461-4455

Attorneys for Petitioner
Linda Mulligan

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21 See discussion in text, Section II C, *supra;* notes 14-15 and accompanying text.